Center State Beef and Veal Co., Inc. *and* Teamsters Local 317, affiliated with the International Brotherhood of Teamsters. Cases 3–CA–21521, 3–CA–21582, 3–CA–21636, and 3–CA–21702

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

Upon charges and amended charges filed by the Union on September 15, October 16, and November 23, 1998, and January 8, 1999, the General Counsel of the National Labor Relations Board issued a consolidated complaint on November 25, 1998, an amended consolidated complaint on December 8, 1998, and a second amended consolidated complaint on January 27, 1999, against Center State Beef and Veal Co., Inc., the Respondent, alleging that it has violated Section 8(1), (3), and (5) of the National Labor Relations Act. Subsequently, on January 11, 1999, the Respondent filed an answer to the consolidated complaint. On February 11, 1999, however, the Respondent withdrew its answer to the consolidated complaint. Further, the Respondent did not file an answer to either the amended consolidated complaint or the second amended consolidated complaint.

On February 26, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On March 2, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Boards Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint, the amended consolidated complaint, and the second amended consolidated complaint all affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

In addition, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letters dated January 5 and 6, 1999, notified the Respondent that unless an answer to the amended consolidated complaint were received by January 12, 1999, a Motion for Summary Judgment would be filed. The Motion for Summary Judgment also states without contradiction that the Region, by letter dated February 3, 1999, confirmed its telephone conversation with the Respondent in which the Respondent asserted that it would not file further answers in this proceeding and would not appear at the hearing scheduled for February 16, 1999. Finally, by letter to the Region dated February 11, 1999, the Respondent withdrew its answer to the consolidated complaint, and stated that it was "aware that a summary judgement [sic] may be attached."

Such a withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.[1]

Accordingly, based on the withdrawal of the Respondent's answer to the consolidated complaint, and in the absence of good cause being shown for the failure to file a timely answer to the amended consolidated complaint and the second amended consolidated complaint, we grant the General Counsels Motion for Summary Judgment insofar as the second amended consolidated complaint (complaint) alleges that the Respondent violated Section 8(a)(1) and (3) of the Act.

The complaint, however, further alleges in conclusionary terms that the Respondent's unfair labor practices are "so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight," and that therefore a bargaining order is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Although we agree that the violations of Section 8(a)(1) and (3) here are serious in nature, the complaint does not allege sufficient facts to enable the Board to evaluate the pervasiveness of the violations. For example, the complaint does not allege the size of the unit or the extent of dissemination, if any, of the violations among the employees not directly affected by them. Accordingly, consistent with prior Board decisions, we deny the General Counsel's Motion for Summary Judgment insofar as it alleges that a bargaining order is appropriate and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union, including bargaining over the effects on its employees of its decision to close its facility in Cortland, New York.[2] We shall remand the case

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

[2] See, e.g., *Imperial Floral Distributors*, 319 NLRB 147 (1995); *FJN Mfg.*, 305 NLRB 656 (1991); *Bravo Mechanical*, 300 NLRB 1019 (1990); *Control & Electrical System Specialists*, 299 NLRB 642 (1990); *Binney's Casting Co.*, 285 NLRB 1095 (1987); *Michigan Expediting Service*, 282 NLRB 210 (1986); and *Power Jet Cleaning, Inc.*, 270 NLRB 975 (1984). We therefore also deny the General Counsel's request for a make-whole order under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as a remedy for the Respondent's alleged 8(a)(5) failure to bargain with the Union over the effects of the closure of its Cortland facility. In the absence of an answer, however, we find the various factual allegations underlying the alleged 8(a)(5) violations to be admitted. These allegations include the allegations that the bargaining unit is appropriate, that a majority of the unit employees have designated the Union as their bargaining representative, that the Union requested the Respondent to recognize and bargain with it as the exclusive representative of that unit, that the Respondent refused to do so,

for a hearing before an administrative law judge on the issue of whether a bargaining order is an appropriate remedy under the circumstances of this case.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Cortland, New York, has been engaged in the slaughter and processing of meat products. During the 12-month period preceding issuance of the second amended consolidated complaint (complaint), the Respondent, in conducting its business operations described above, sold and shipped from its Cortland, New York facility, meat products valued in excess of $50,000 directly to points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Between September 14, 1998 and October 5, 1998, the exact dates being presently unknown, the Respondent, by its vice president and agent Victor Broccoli at the Respondent's facility: (1) informed employees that if they selected the Union as their collective-bargaining representative, all employees would be paid the same; (2) told employees that if they selected the Union as their collective-bargaining representative, current employees would make the same wages as new employees, and urged employees to vote against the Union to prevent that occurrence; (3) offered an employee a wage raise if the employee voted against the Union; (4) threatened an employee that the Respondent's facility would close if employees selected the Union as their collective-bargaining representative; (5) promised employees a job and a raise at a different facility if they voted against the Union; and (6) threatened to have an employee arrested if he came on the Respondent's premises to vote in the representation election.

On about September 11, 1998, the Respondent discharged employees Gerald Cobb, Jr. and Rodney Clark, and permanently laid off employee Jon Horner. On about October 5, 1998, the Respondent discharged employee Kenny Grewe. The Respondent discharged and laid off the above employees because they formed, joined, or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

By the statements described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. In addition, by the discharges and layoff described above, the Respondent has discriminated in regard to hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act. The Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Gerald Cobb, Jr., Rodney Clark, and Kenny Grewe, and by permanently laying off Jon Horner, we shall order the Respondent, in the event it reopens its Cortland, New York facility, to offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. In addition, we shall order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by paying them backpay from the time of their discharges and/or layoff until the date the facility closed. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to remove from its files any reference to the unlawful discharges or permanent layoff of employees Cobb, Clark, Grewe, and Horner, and to notify these employees in writing that this has been done and that those actions will not be used against them in any way.

Further, inasmuch as the Respondent's facility is now closed, we shall order the Respondent to mail copies of the notice to all unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Center State Beef and Veal Co., Inc., Cortland, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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and that the Respondent closed its facility without affording the Union notice or an opportunity to bargain about the effects of the closing on unit employees.

[3] Nothing contained herein requires a hearing if, in the event of an amendment to the complaint, the Respondent fails to answer thereby admitting evidence that would permit the Board to resolve the bargaining order issue. In such circumstances, the General Counsel may renew the Motion for Summary Judgment with respect to the 8(a)(5) allegations and remedies.

(a) Telling employees that if they select Teamsters Local 317, affiliated with the International Brotherhood of Teamsters, as their collective-bargaining representative that all employees would be paid the same, and current employees would make the same wages as new employees.

(b) Offering employees a wage raise if they vote against the Union.

(c) Threatening employees that the Respondent's facility would close if they select the Union as their collective-bargaining representative.

(d) Promising employees jobs and raises at a different facility if they vote against the Union.

(e) Threatening employees with arrest if they come on the Respondent's premises to vote in a representation election.

(f) Discharging or permanently laying off employees because they form, join, or assist the Union, or because they engage in concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full reinstatement to employees Gerald Cobb Jr., Rodney Clark, Kenny Grewe, and Jon Horner, in the event that the Respondent reopens the Cortland, New York facility, to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make employees Cobb, Clark, Grewe, and Horner whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges and layoff, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and layoff of employees Cobb, Clark, Grewe, and Horner, and within 3 days thereafter, notify them in writing that this has been done and that their discharges and layoff will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[4] to all current employees and former employees employed by the Respondent at any time since September 11, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell you that if you select Teamsters Local 317, affiliated with the International Brotherhood of Teamsters, as your collective-bargaining representative that all employees would be paid the same, and current employees would make the same wages as new employees.

WE WILL NOT offer you a wage raise if you vote against the Union.

WE WILL NOT threaten you that our facility will close if you select the Union as your collective-bargaining representative.

WE WILL NOT promise you jobs and raises at a different facility if you vote against the Union.

WE WILL NOT threaten you with arrest if you come on our premises to vote in a representation election.

WE WILL NOT discharge you or permanently lay you off because you form, join, or assist the Union, or because you engage in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, in the event that we reopen the Cortland, New York facility, offer employees Gerald Cobb Jr., Rodney Clark, Kenny Grewe, and Jon Horner full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make employees Cobb, Clark, Grewe, and Horner whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges and layoff, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges and layoff of employees Cobb, Clark, Grewe, and Horner, and within 3 days thereafter, WE WILL notify them in writing that this has been done and that their discharges and layoff will not be used against them in any way.

CENTER STATE BEEF AND VEAL CO. INC.